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IN THE

Supreme Court of The United States

October Term, 1979

No. 79-63

Columbia Gas Transmission Corporation,
Petitioner,

v.

Southgate Development Corporation,
Respondent,

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS
FOR LORAIN COUNTY, OHIO

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Southgate Development Corporation ("Southgate") respectfully requests that this court deny the petition for writ of certiorari, seeking review of the decision and journal entry of the Court of Appeals for Lorain County entered on April 20, 1979, which appears at pp. 3a-9a in the Appendix of the Petition filed with this court, for any one or more of the following reasons:

1. The decision and journal entry is not a *final* judgment, within the meaning of 28 U.S.C. §1257;

2. The Court of Appeals by such decision and entry did not decide "a federal question of substance" within

the meaning of Rule 19(1) (a) of the Rules of the Supreme Court of the United States; nor was its decision and entry based upon a determination of any of the federal issues enumerated in paragraph (3) of 28 U.S.C. §1257; and

3. To the extent that Petitioner, Columbus Gas Transmission Corporation ("Columbia Transmission"), is claiming that the Supremacy Clause of Article VI of the Constitution of the United States would require a judgment or decree contrary to that of the Ohio Court of Appeals, such cannot be considered as a final judgment or decree "rendered by the *highest* court of a State" since such issue was never properly appealed to the Ohio Supreme Court pursuant to provisions of the Ohio Constitution and to the rules of the Ohio Supreme Court.

STATEMENT OF THE CASE

From the inception the fundamental issue underlying this case has been whether Columbia Transmission as the admitted *owner* of a right-of-way easement, and as the admitted *owner* and *user* of an interstate pipeline constructed therein over and through land owned by Southgate, owes *any* obligation to Southgate where the principal consideration, agreed to by arms length negotiation between the prior owner of both the easement and the pipeline, Ohio Fuel Gas Company, and the prior owner of the land, Cleveland Trust Company, was the right of the "Grantor, its heirs and assigns," to "purchase gas therefrom" until such time as the pipeline be removed or abandoned.

Throughout the litigation in the state courts, the principal contention of Columbia Transmission has been that *it* has *no obligation whatsoever* under the terms of the easement deed; that it may nevertheless continue to own, occupy, and use the easement to its full advantage; but that any and *all obligations* under the terms of the easement deed "devolved" upon an *intrastate* gas utility company, i.e. Columbia Gas of Ohio, Inc. ("Columbia of Ohio"), a separate corporation. Based upon his interpretation of the intent of the Ohio Public Utilities Commission at the time that it approved the 1964 "spin-off" of the corporate assets of Ohio Fuel, the trial court agreed with this contention, and on this basis concluded that "Columbia of Ohio is the obligor of gas to Southgate," and thus rendered judgment "for the defendant," Columbia Transmission. (p. 16a of Petition)

In its appeal to the Court of Appeals, Southgate assigned as error:

"1) The Common Pleas Court erroneously concluded that the right to purchase gas from an interstate gas transmission pipeline granted in a right of way easement covenant as part of the consideration for the right of way is subject to regulation by the Public Utilities Commission of Ohio and, therefore, 'devolved' upon Columbia Gas of Ohio, Inc. pursuant to PUCO order, whereas in truth such right is subject to regulation only by the Federal Power Commission (now Federal Energy Regulatory Commission) and is beyond the jurisdictional reach of the Public Utilities Commission of Ohio, and

"2) Columbia Transmission Corporation breached its obligation under the right of way covenant by refusing to take any action to comply therewith, including the filing of an application with the Federal Power Commission for a certificate of public convenience and necessity authorizing Columbia Transmission to fulfill its contractual obligation."

The arguments of Columbia Transmission in its brief to the Court of Appeals contra Southgate's assignments of error were under the following subheadings:

"(1) Sales of gas by a public utility pursuant to right-of-way covenants have always been held to be utility sales under PUCO jurisdiction, and were specifically held to be such in the case of Ohio Fuel Gas Comapny.

(2) The universal rule of American law is that a State regulatory agency can modify or even abrogate contracts for utility service.

(3) The PUCO had jurisdiction to order in 1963 . . . that Ohio Fuel's duty to serve under right-of-way covenants such as in this case . . . should devolve upon Columbia Gas of Ohio.

(4) Although Columbia Transmission is not now a public utility under Ohio law, it would become such if it commenced the retail sale of gas under the thousands of right-of-way covenants granted by Ohio Fuel.

(5) As soon as the gas shortage eases so as to permit utility service to new customers such as Southgate, the regulatory statutes provide a means for Southgate to enforce its rights thereto.

(6) No matter who has the duty to serve Southgate, Southgate is not entitled to an unlawful preference during the emergency of the gas shortage, so that the refusal to render service does not breach the right-of-way covenant and would not support an award of damages."

The Court of Appeals decision and entry rejected the argument of Columbia Transmission that "any duties under the right-of-way easement 'devolved' upon Columbia Gas of Ohio" (p. 6a), and also rejected "defendant's argument that the PUCO has exclusive jurisdiction in this matter" (p. 7a), and on such basis sustained Southgate's first assignment of error.

The Court of Appeals also sustained Southgate's second assignment of error, stating with respect thereto:

"Based on our discussion above, we hold that Columbia Transmission had a contractual obligation to attempt to secure the necessary authorization to provide Southgate with natural gas service.

The question of when, or even whether, Southgate will receive natural gas service is for the appropriate regulatory agency to answer. We decide here only that Columbia Transmission had a duty to seek authorization under the right-of-way

easement agreement. That duty was breached, and Southgate alleges damages from that breach, the existence and amount of which must be determined by the trial court.

We reverse and remand this cause to the trial court for further proceedings in accordance with this opinion."

Rule 12 of the Ohio Rules of Appellate Procedure provides that in every appeal from a trial court of record to a court of appeals "[t]he appeal shall be determined on its merits on the assignments of error set forth in the briefs. . ., on the record on appeal. . ., and . . . on the oral arguments of the parties, or their counsel. . .," and requires that "[a]ll errors assigned and briefed shall be passed upon by the court in writing. . . ." Having thus sustained both of Southgate's assignments of error and stated its reasons therefor in writing, the Court of Appeals had fully complied with all Ohio procedural requirements. In such appeals the Court of Appeals is not required to discuss every "argument" made by the appellee.

Thereafter, Columbia Transmission, on the basis of the claim that the case was of public or great general interest, requested the Ohio Supreme Court, pursuant to Article IV, Section 2(B) (2) (d), to direct the Court of Appeals to certify the record to the Ohio Supreme Court. It did not, however, pursuant to Ohio procedure attempt to apepal to the Ohio Supreme Court as a matter of right under Article IV, Section 2(B) (2) (a) (iii), on the basis that the case involved "questions arising under the constitution of the United States." The Ohio Supreme Court denied the motion to certify the record, and thereafter the petition for writ of certiorari was filed by Columbia Transmission in this Court.

REASONS WHY THE WRIT SHOULD BE DENIED

I

Not a Final Judgment or Decree

By the terms of 28 U.S.C. §1257 the jurisdiction of this Court to review judgments of a state court requires that there be a "[f]inal judgment or decree."

Ordinarily an order which, as here, determines liability or breach of a duty, but leaves the determination of damages to be decided on remand, could not be considered as a "final judgment or decree" of the state court. *State of Washington, ex rel. Grays Harbor Logging Co.* v. *Coats-Fordney Logging Co.*, 243 U.S. 251 (1917); *Bruce* v. *Tobin*, 245 U.S. 18 (1917). See also *NAACP* v. *Williams*, 359 U.S. 550 (1959).

As stated in *Grays Harbor*, supra:

> "When the litigation in the state courts is brought to a conclusion, the case may be brought here upon the federal questions already raised as well as any that may be raised hereafter; for although the state courts, in the proceedings still to be taken, presumably will feel themselves bound by the decision heretofore made by the Supreme Court, . . . as laying down the law of the case, this court will not be thus bound."

We would submit that, in general, any remand by a state appellate court to a state trial court for the purpose of determining "the existence and the amount" of damages cannot be construed to be "the final word" of a state court [*Market Street R. Co.* v. *Railroad Commission*, 324 U.S. 548, 551 (1945)], and that the application of the "practical rather than a technical construction" of the "final judgment" requirement [*Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541, 546 (1949)]

cannot logically or reasonably be expanded to encompass the decision and entry of the Court of Appeals herein within such jurisdictional requirement.

Moreover, we would submit that the instant case does not fall into any of the "four categories" of cases in which this court "has treated the decision of the federal issue as a final judgment for the purposes of 28 U.S.C. §1257 and has taken jurisdiction without awaiting the completion of the additional proceedings anticipated in the lower state courts." *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 477 (1975). These "four categories" involve "recurringly encountered situations in which the highest court of a state has finally determined the federal issue present in a particular case, but in which there are further proceedings in the lower state courts to come." Id. p. 477. In the instant case, as will be discussed under Part II, infra, the judgment of the Court of Appeals was not based upon a determination of any "federal issue," within the purview of 28 U.S.C. §1257(3).

II

Judgment Not Based Upon Determination of Federal Issue

Petitioners seeks to invoke this court's jurisdiction under paragraph (3) of 28 U.S.C. §1257. Since neither the "validity of a treaty or statute of the United States" nor the "validity of a State statute" (on the ground of its being repugnant to the Constitution, treaties or laws of the United States) has been "drawn into question," no "federal issue" can be said to "present" in this case unless the case could be said to involve a "title, right, privilege or immunity" which "is specially set up or claimed under the Constitution, treaties or statutes. . . of . . . the United States," but which claim was specifically rejected by a "final judgment" of the "highest court" of Ohio.

Although not explicitly stated, Columbia Transmission apparently is claiming that it possesses an "immunity" from suit for breach of contract by virtue of its failure to comply with the consideration provision in the grant of the right-of-way easement. If so, Columbia Transmission has not "specially set up" such a claim and has made no reference to any specific provision of the Constitution or the statutes of the United States which would so provide. To the contrary, the "Fourth Defense" which Columbia Transmission now asserts "led directly to the primary federal question presented in this appeal" (p. 6), was to the effect that Southgate sought "a preference in contravention of the policies" of the FPC [now the FERC]; and that those cases in which the FPC authorized the actual delivery of gas to serve right-of-way customers, who had been promised such gas as the consideration or

part of the consideration for granting of an easement, were factually distinguishable, and that its failure to even make application to the FERC was legally excusable upon the basis that, in the opinion of Columbia Transmission, the FERC would not have granted any such application even if made; in other words, relegating to itself the right to determine what the FERC would or would not have done.

It is asserted (p. 6) that although Columbia Transmission in its reply brief in the Court of Appeals "urged the substance of the Fourth Defense," the Court of Appeals "completely ignored this argument and held that Columbia Transmission had a contractual duty to Southgate which had been breached."

The only reference in the forty-one page brief of Columbia Transmission, filed in the Ohio Court of Appeals, to the "supermacy clause" as it might potentially be applicable to any award of damages, is contained in a single sentence of the brief at p. 38 reading:

> "If the courts of Ohio should award damages, they would be imposing State policy ahead of and in opposition to FERC policy; and, under the Backus rule [*Backus* v. *Panhandle Eastern Pipeline Co.*, 558 F. 2d 1373 (10th Cir. 1977)], this would be invalid under the supremacy clause."

We believe that such falls far short of the requirement that the "federal issue" be brought to the attention of the state court with "fair precision." *Street* v. *New York*, 394 U.S. 576 (1969). Moreover, such method of presentation falls far short of the requirement of Rule 23(f) of the rules of this court that "the statement of the case shall also specify the stage in the proceedings . . . in the appellate court, at which, and the manner in which, the federal questions sought to be

reviewed were raised; the method of raising them. . .; and the way in which they were passed upon by the court;" and with specific reference to the record "as will show that the federal question was timely and *properly raised* so as to give this court jurisdiction to review the judgment on writ of certiorari." (Emphasis added)

Under such state of the record we suggest that another rule, enunciated by this court in *Street* v. *New York*, supra, is applicable. This court therein stated that:

> "When, as here, the highest state court has failed to pass upon a federal question, it will be presumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary."

This same rule also is announced in *Fuller* v. *Oregon*, 417 U.S. 40 (1974).

Columbia Transmission contends (p. 9) that the Court of Appeals "decided a federal question of substance not in accord with" this court's decision in *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972). That case did not involve, nor did it even discuss, the question of damages for breach of a contractural obligation entered into as the consideration for the granting of a deed of easement.

Columbia Transmission also asserts (p. 14) that the judgment of the Court of Appeals "by upholding Southgate's claim for damages and refusing to consider the effect of" an FPC order conflicts with decisions of the United States Courts of Appeals for the District of Columbia and the Tenth Circuits, as well as administrative decisions. Neither of the decisions cited by Colum-

bia Transmission in support of this assertion involved consideration of the question of damages. Thus, it is asserted only that *City of Huntingburg* v. *FPC*, 555 F. 2d 1033 (D.C. Cir. 1977) "implicity supports" Columbia Transmission's contentions, and that *Backus* v. *Panhandle Eastern Pipeline Co.*, supra, [558 F. 2d 1373] "[b]y extension" suggests that an award of damages on Southgate's theory of the case would be unconstitutional state action.

With respect to the assertion that the judgment of the Court of Appeals is in conflict with FPC order No. 467-B, it should suffice to point out that such order, as well as orders which preceded it, were "intended only to state initial guidelines as a means of facilitating curtailment planning and the adjudication of curtailment cases." (p. 37a) Moreover, *International Paper Company* v. *Federal Power Commission*, 476 F. 2d 121 (5th Cir. 1973), referred to at p. 11 of the petition, concluded that "a court which has the actual damage suit before it, and also the final FPC action, is best suited to determine the applicability of a defense recognized in contract law." 476 F. 2d at p. 126.

Columbia Transmission contends [pp. 11, 12] that the FPC's "original policy decision" had held that "an approved curtailment plan constructed an absolute defense for breach of contract"; that the Fifth Circuit "reversed" in *International Paper Company*, supra; that thereafter the FPC revised its position thereby concluding that "an approved curtailment plan would be a defense to an action for breach of contract, except where the pipeline had to curtail its services due to its own negligence, bad faith, or wrongful conduct."

The history of the various rulings of the Fifth Circuit with respect to the policy positions of the FPC is

discussed in detail in the opinion of that circuit in *Mississippi Power & Light Company* v. *United Gas Pipe Line Company*, 532 F. 2d 412 (1976). As pointed out therein, necessity for curtailment gives rise to "two distinct problems":

(1) "how much of the available supply of natural gas each of the pipeline's customers would receive," and

(2) "who would bear the economic consequences of the shortage."

It will be noted that subsequent to the adoption by the FPC of the policy that damages could not be obtained in the absence of "negligence, bad faith, or other wrongful conduct," the Fifth Circuit in *State of Louisiana* v. *FPC*, 503 F. 2d 844 (1974) again vacated the FPC's findings. In its decision in *Mississippi Power & Light Company* the court at p. 416 stated that "since the Commission cannot adjudicate contract liability," its policy determination should be based on the assumption that the natural gas company "faces possible liability—not on the assumption it is immune."

In *Monsanto Company v. FPC*, 463 F. 2d 799 (1972), the United States Court of Appeals for the District of Columbia Circuit held that even though FPC had jurisdiction to approve a natural gas company's curtailment proceeding, it did not automatically follow that industrial gas users having a firm contract with the natural gas company are precluded from bringing breach of contract actions against that company.

Columbia Transmission also appears to be asserting that it is immune from any damage suit of the type involved here based upon the approval by the FERC of certain tariff provisions contained at pp. 41a-45a of its petition.

Even those federal cases which have delayed final determination of an action for breach of contract, such as involved here, until reference has been made to the FERC with respect to its position on certain issues, recognize that in the last analysis the question of whether there is a breach of contract, and the question of the determination of damages, if any, resulting therefrom *must be determined in a court of law* and are not and cannot be determined by a regulatory agency, such as the FERC. *Carter* v. *American Telephone & Telegraph Co.*, 365 F. 2d 486 (5th Cir. 1966); *Consolidated Edison Co. of New York, Inc.* v. *FPC*, 512 F. 2d 1332 (1975); *Monsanto Company* v. *FPC*, supra, [463 F. 2d 799]. In *CF Industries, Inc.* v. *Transcontinental Gas Pipe Line Corporation*, 452 F.Supp. 358 (D.C. W.D. N.C. 1978), the court concluded that the extent to which a curtailment plan ordered by an regulatory agency can immunize a pipeline from damage liability involves variants of well-known contract defenses "which are within the conventional competence of courts and juries."

Columbia Transmission also asserts that the Court of Appeals decided a federal question of substance not in accord with applicable decisions of this court by its holding that FERC "had exclusive jurisdiction to direct retail sales from an interstate transmission pipeline, to the exclusion of the Public Utilities Commission of Ohio," (p. 18) What the Court of Appeals actually did was to reject Columbia Transmission's argument that the PUCO had "exclusive jurisdiction in this matter." As a matter of fact, Columbia Transmission had stipulated that if it, and not Columbia Gas of Ohio, had obligated itself by contract to Southgate, as the successor to the grantor of the easement, the approval of the FERC would be required in order for it to fully

fulfill such obligation. The Court of Appeals correctly concluded (p. 7a) that this court in *FPC* v. *Louisiana Power & Light Co.*, supra, [406 U.S. 621] had held that the FPC had authority to regulate curtailment of direct intrastate sales of natural gas (not involving sales for resale) under its regulatory power over "the transportation of natural gas in interstate commerce." As noted therein (p. 638), the proviso of §1(b) "withheld from FPC only *rate-setting* authority with respect to direct sales" and "[c]urtailment regulations are not *rate-setting* regulations but regulations for the 'transportation' of natural gas, and thus within FPC jurisdiction. . . ."

Since the question of "rate-setting" is not involved herein, the Court of Appeals quite properly concluded that it is the FERC, and not the Ohio Public Utilities Commission, which is vested with the power to regulate curtailment of *direct* sales of natural gas from an interstate pipeline.

Whether Columbia Transmission would or would not have been in breach of contract had it made application to FERC to fulfill its contractural obligation to Southgate is not involved herein since as the only legal entity permitted to file an application with the FERC for such authority, it has simply refused to do so. Its authority to so file is contained in 15 U.S.C. 717f(c).

The Ohio law of contracts places upon Columbia Transmission the duty to seek such authority. As held in *Security Sewage Equipment Co.* v. *McFerren*, 14 Ohio St. 2d 251 (1968), one who contracts to render a performance for which a government approval is required assumes the duty of obtaining such, and the risk of its refusal is on him. See also *Corbin on Contracts*, 435, Section 1368.

We would submit, therefore, that the judgment of

the Court of Appeals was based upon applicable Ohio law and did not involve any "federal issue" within the contemplation of 28 U.S.C., §1257(3), or any "federal question of substance" within the purview of Rule 19 of this court.

III

Final Judgment Not Rendered by Highest Court of State

The "federal issue" asserted by Columbia Transmission is to the effect that the decision and judgment of the Court of Appeals conflicts with the Supremacy Clause of Article VI of the Constitution of the United States. Thus, petitioner is asserting that this case involves questions arising under the Constitution of the United States.

Article IV, Section 2(B) (2) (a) (iii) provides that the Ohio Supreme Court shall have appellate jurisdiction in appeals from the courts of appeals *as a matter of right* in cases "involving questions arising under the constitution of the United States. . . ." Such appeal as a matter of right must be distinguished from the authority of the Ohio Supreme Court under Article IV, Section 2(B) (2) (d) in "cases of public or great general interest" to "direct any court of appeals to certify its record to the Supreme Court" in which event the Ohio Supreme Court has authority to "review and affirm, modify, or reverse the judgment of the court of appeals."

Rule I, Section 1(A) (c) of the Rules of Practice of the Supreme Court of Ohio requires that the notice of appeal shall state "[i]f applicable, that the case involves a substantial constitutional question." Rule II, Section 3(B) provides that "[w]here appellant claims that he has an appeal as of right (i.e. that the case involves a constitutional question), the Supreme Court will *sua sponte*, consider the case as on a motion to dismiss the appeal as one not involving any substantial constitutional question and will consider such motion

to dismiss at the same time that it considers any motion to certify or motion for leave to appeal in the case."

In the instant case the notice of appeal by Columbia Transmission did not claim that the case involved a substantial constitutional question, and thus the Ohio procedural requirements required to institute an appeal as of right under the provisions of the Ohio constitution were not met.

The Rules of Practice of the Supreme Court of Ohio may be found in 26 Ohio St. 2d and Rule I, as amended, in 50 Ohio St. 2d.

This court has held that the judgment of an intermediate state appellate court may be considered to be that of the "highest court of [the] State" where a review of the judgment of the intermediate court is denied by the highest court in the exercise of its power to allow a discretionary review. Even such discretionary review, however, must be sought in the right way. *Gotthilf* v. *Sills*, 375 U.S. 79 (1963).

Where an order dismissing the attempted appeal to the highest court of the state is based upon failure to conform to state rules of practice, neither the order of the state court nor that of the intermediate state court will support this court's jurisdiction. *Newman* v. *Gates*, 204 U.S. 89 (1907); *Chesapeake & Ohio R. Co.* v. *McDonald*, 214 U.S. 191 (1909); *Hammerstein* v. *Superior Court*, 241 U.S. 491, 492 (1951).

In *Matthews* v. *Huwe*, 369 U.S. 262 (1925), the distinction between the authority of the Ohio Supreme Court to dismiss an appeal in a case involving a claimed constitutional question (which would be a "decision of the merits") and the authority of that court to deny a discretionary review was recognized. In *Matthews*, an appeal as of right was attempted, but no attempt was

made to apply to the court for discretionary review. Under these circumstances the opinion of Chief Justice Taft concluded that the decree of the Court of Appeals did not become that of the "highest court." By a parity of reasoning, we would submit that where, as here, no attempt was made to appeal as of right to the Ohio Supreme Court on the basis that the case involved "questions arising under the constitution of the United States" (a procedure which is specifically provided for in the Ohio constitution and in the Rules of Practice of the Supreme Court of Ohio), the decision and entry of the Court of Appeals should not be considered as that of the "highest court" of the State of Ohio, the Ohio Supreme Court.

In *Michigan* v. *Tyler*, 436 U.S. 499 (1978), the footnote at p. 512 states that a failure to "present a federal question in conformity with state procedure constitutes an adequate and independent ground of decision bearing review in this Court, so long as the State has a legitimate interest in enforcing its procedural rule." No claim has been made, nor could it be made, that Ohio does not have a legitimate interest in enforcing its procedural rule.

The order of the Supreme Court of Ohio is contained at p. 2a of the petition. It will be noted that this order is directed only toward a motion for an order directing the Court of Appeals for Lorain County to certify its record, such motion being overruled. Had an appeal of right been taken on the basis of the claim that the case did involve "questions arising under the constitution of the United States," the dismissal of such claim, pursuant to Rule II, Secton 3(B), would have been contained on an order which in pertinent part would have read:

"This cause, here on appeal as of right from the Court of Appeals for _____ County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein."

In *Beck* v. *Washington*, 369 U.S. 541 (1962), this court held that each state may "prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this respect are no less applicable when Federal rights are in controversy then when the case turns entirely upon questions of local or general law."

CONCLUSION

For any and all of the reasons heretofore stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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